

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TONY McCLENDON,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	NO. 02-CV-7433
	:	
TODD LEWIS, OFFICER, et al.,	:	
Defendants	:	

MEMORANDUM

STENGEL, J.

January 27, 2005

On November 13, 2002, Tony McClendon, an inmate at the State Correctional Institution at Albion, filed this *pro se* civil rights complaint pursuant to 42 U.S.C. § 1983 against Officer Carol Enoch and Officer Todd Lewis¹ alleging violations of his constitutional rights under the Fourth² and Fourteenth Amendments. Specifically, Mr. McClendon claims that Officer Enoch violated his “rights of due process by acting on information she received from an anonymous informant that she states was a radio flash on the Temple radio, or a person on the street.” Officer Enoch has filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 56, to which Mr. McClendon has responded. For the reasons that follow, I will grant the motion for summary judgment in its entirety.

BACKGROUND

The facts of the case are gleaned from the record and are viewed in the light most favorable to Mr. McClendon as the non-moving party. On June 25, 1996, Officer Enoch was

¹By Order dated September 22, 2003, the Honorable Stewart Dalzell dismissed Mr. McClendon’s action against Officer Lewis without prejudice because Mr. McClendon failed to serve the Complaint upon Officer Lewis.

²The Fourth Amendment protects the right of people to be secure against unreasonable searches and seizures. See Kornegay v. Cottingham, 120 F.3d 392, 396 (3d Cir. 1997) (citing Wilson v. Arkansas, 514 U.S. 927, 931 (1995)).

employed as a patrol officer on Temple University's police force, assigned to work in plainclothes with Philadelphia police officer Todd Lewis on and around Temple University's campus. (*See* Def.'s Exhibit B at 1, 3, 4). While the officers were on duty, a "flash" was broadcast over the police radio reporting "a male waiving a gun, using a payphone, sitting on a bicycle, wearing a white t-shirt and black shorts" near Cecil B. Moore Avenue in Philadelphia. *Id.* at 5. Officers Enoch and Lewis then observed a man, later identified as Tony McClendon, sitting on a bicycle near a payphone near Cecil B. Moore Avenue, which fit the description of the individual identified in the "flash." *Id.* at 6. The officers exited their unmarked police vehicle and approached Mr. McClendon. *Id.* at 7. Officer Lewis briefly questioned Mr. McClendon and conducted a "pat down" of his pockets. *Id.* at 8. Upon Officer Lewis's advising Officer Enoch that Mr. McClendon was armed, Mr. McClendon broke away from Officer Lewis and fled on foot. *Id.* at 11, 12. Officer Lewis gave chase on Mr. McClendon's discarded bicycle, and Officer Enoch returned to the police vehicle. *Id.* at 13, 14. Officer Lewis apprehended and arrested Mr. McClendon. *Id.* at 15. After Mr. McClendon was taken into custody, a search of Mr. McClendon's person revealed a loaded handgun and a clear baggie containing 159 green and clear packets of an off-white chunky substance. *Id.* at 16; *see also* Def.'s Ex. C. Mr. McClendon was charged with assault, possession with intent to deliver a controlled substance, and a violation of the Uniform Firearms Act; he was convicted on all counts on August 15, 1997. (*See* Def.'s Ex. B at 17, 19).

In his complaint, Mr. McClendon states that Officers Enoch and Lewis had neither reasonable suspicion nor probable cause to stop him, because neither officer observed any crime, and both acted on an alleged radio flash of an anonymous informant whose reliability had not

been established. Mr. McClendon further states that the description of the actor in the alleged radio flash was not sufficiently particularized to justify stopping him, and therefore any seizure made during his arrest was poisonous fruit of that illegal stop, search, and arrest.

In his response to Officer Enoch's motion for summary judgment, Mr. McClendon argues that Officer Lewis failed to identify himself as a police officer which prompted Mr. McClendon to feel threatened and to flee for his life; that Officer Lewis could not establish that he had witnessed a crime; that Officer Lewis could not establish probable cause or exigent circumstances to search or arrest Mr. McClendon; that Mr. McClendon did not own or drive a green Mazda, or have a driver's license; that Mr. McClendon was not waiving a gun, but he was on the payphone, and on a green bike; and that Mr. McClendon did not show any threatening measure which would do harm to himself or others. Mr. McClendon further argues that Officer Enoch "is only a security officer at Temple University. . .who only witnessed petitioner running on the campus; but did not witness any crime; and only can establish and acknowledging [sic] the search and seizure of petitioner which is unlawful."

LEGAL STANDARD

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant’s initial Celotex burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. at 322. Under Rule 56, the court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255. The court must decide not whether the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. Id. at 252. If the non-moving party has exceeded the mere scintilla of evidence threshold and has offered a genuine issue of material fact, then the court cannot credit the movant’s version of events against the opponent, even if the quantity of the movant’s evidence far outweighs that of its opponent. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

DISCUSSION

Pursuant to 42 U.S.C. § 1983, a private right of action exists for an individual who asserts that his civil rights under the Constitution have been violated by an actor who allegedly violated those rights under the color of state law. The statute itself does not create any substantive rights, but instead protects rights established by the Constitution:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. Thus, in order to recover under this statute, Mr. McClendon must plead and prove two essential elements. First, there must be a deprivation of Mr. McClendon's "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Baker v. McCollan, 443 U.S. 137, 140 (1979). Second, Mr. McClendon must prove that Officer Enoch deprived him of these rights under color of state law. Monroe v. Pape, 365 U.S. 167, 171-188 (1961).

Before addressing the merits of this case, it is important to note that Mr. McClendon's case is time-barred. There is no federal statute of limitations for § 1983 claims. However, the Supreme Court of the United States has directed courts to "borrow" the state's statute of limitations for the most analogous cause of action, and has determined that § 1983 claims are most analogous to common law tort actions. Wilson v. Garcia, 471 U.S. 261, 266-267 (1985). The Court further held that § 1983 claims are subject to a state's statute of limitations for personal injury actions. Id. at 280. Since then, courts within our district have applied

Pennsylvania's two year statute of limitations for personal injury actions when addressing § 1983 claims.³ See Barkley v. FMP/Lakeside Assocs., 1999 U.S. Dist. LEXIS 7519 (E.D. Pa. May 14, 1999); Lanning v. Lt. William Fithian, 1988 U.S. Dist. LEXIS 13936 (E.D. Pa. Dec. 6, 1988); see also Epps v. City of Pittsburgh, 33 F. Supp.2d 409 (W.D. Pa. 1998). While state law controls the period of limitations, federal law determines when a cause of action accrues and the statute begins to run. Barkley v. FMP/Lakeside Assocs., 1999 U.S. Dist. LEXIS at *11. Under federal law, a cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or has reason to know of the injury that is the basis of the action. Id. (citing Sandutch v. Muroski, 684 F.2d 252, 254 (3d Cir. 1982)).

In this case, there is no dispute that the stop, search, and arrest of Mr. McClendon occurred on June 25, 1996. The limitations period within which to file a claim, therefore, expired on June 26, 1998. Mr. McClendon filed this complaint in November 2002, over four years after the expiration of the statute of limitations. He has not argued that the court should toll the statute of limitations pursuant to the doctrine of equitable tolling. Equitable tolling is appropriate where: 1) the defendant has actively misled the plaintiff respecting the cause of action; 2) the plaintiff has in some extraordinary way been prevented from asserting his rights; or 3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. Kocian v. Getty Refining & Marketing Co., 707 F.2d 748, 753 (3d Cir. 1983). However, equitable tolling "is not an open-ended invitation to the courts to disregard limitations periods simply because they bar what may be an otherwise meritorious cause." School District of City of Allentown v. Marshall, 657 F.2d 16, 20 (3d Cir. 1981). Although a court might feel

³See 42 Pa. Cons. Stat. § 5524(2).

that justice would be served by tolling the filing period, “experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.” Id. (citing Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980)). Mr. McClendon has offered no evidence which would support the equitable tolling of this case. Thus, because Mr. McClendon filed this action over six years after the incident giving rise to his § 1983 claim, his suit is barred by the statute of limitations.

Next, in her motion for summary judgment, Officer Enoch argues that, even if this case were not barred by the statute of limitations, she would still be shielded from liability through the doctrine of qualified immunity. I agree. Qualified immunity is an affirmative defense that must be pled by a defendant who is a government official.⁴ Gomez v. Toledo, 446 U.S. 635 (1980). While it is an affirmative defense, qualified immunity does not simply protect a defendant from liability, but rather from being tried for actions taken in the course of her duties. Harlow v. Fitzgerald, 457 U.S. 800 (1982). It is an entitlement for government officials not to stand trial or face the other burdens of litigation. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). However, the immunity is forfeited if an officer’s conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.” Wilson v. Layne, 526 U.S. 603, 614 (1999) (quoting Harlow v. Fitzgerald, 457 U.S. at 818).

Thus, there is a two step analysis to determine whether an officer has lost her immunity. First, it must be determined whether a constitutional right would have been violated on the facts alleged. Saucier v. Katz, 533 U.S. 194, 200 (2001). Second, if it is found that a constitutional

⁴In her Answer to Mr. McClendon’s Complaint, Officer Enoch has pleaded qualified immunity as an affirmative defense.

violation did occur, it must next be determined whether the right was “clearly established.” Saucier v. Katz, 533 U.S. at 201; *see also* Groh v. Ramirez, 540 U.S. 551 (2004). The question is whether it would be clear to a reasonable officer that her conduct was unlawful in the situation she confronted. Saucier v. Katz, 533 U.S. at 202; *see also* Kornegay v. Cottingham, 120 F.3d at 396 (clearly established rights are those with contours sufficiently clear that a reasonable official would understand that what she is doing violates that right). This is an objective inquiry to be decided by the court as a matter of law. Bartholomew v. Pennsylvania, 221 F.3d 425, 428 (3d Cir. 2000).

Applying the analysis to this case, it is clear that Mr. McClendon has not successfully proven that Officer Enoch violated his constitutional rights. Mr. McClendon alleges that he was stopped without reasonable suspicion and arrested and searched without probable cause in violation of his Fourth and Fourteenth Amendment rights. In his rendition of the facts of the incident, Mr. McClendon describes in fair detail the actions of Officer Lewis during the stop, search, and arrest; yet he only indicates that Officer Enoch acknowledged “the search and seizure of petitioner which is unlawful.” (*See* Plaintiff’s Response to Defendant’s motion for summary judgment at 8). However, he has produced no evidence to support his allegations or specifically identified Officer Enoch’s personal participation in his stop, arrest, and search on June 25, 1996. Further, Mr. McClendon’s response to Officer Enoch’s interrogatories reiterates the unsubstantiated allegation contained in his complaint: “Carol Enoch violated [his] constitutional rights.” (*See* Plaintiff’s Answers to Defendant’s Interrogatories). This claim against Officer Enoch is based on vague, unsubstantiated allegations which, it has been found, generally cannot survive summary judgment. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir.

1989)(citing Celotex Corp. v. Catrett, 477 U.S. at 325). Once Mr. McClendon fled on foot, Officer Enoch returned to the officers' vehicle. She neither arrested nor searched Mr. McClendon, and he has offered no evidence to the contrary. In the absence of any evidence that Officer Enoch was personally involved in the arrest and search of Mr. McClendon, or that her actions otherwise violated Mr. McClendon's constitutional rights, Officer Enoch would be shielded from liability through qualified immunity, if this case were timely filed.

Nevertheless, assuming, *arguendo*, that Officer Enoch was personally involved in the incident giving rise to the alleged violations of Mr. McClendon's constitutional rights, Mr. McClendon's attempt to overcome Officer Enoch's qualified immunity defense would still be unsuccessful. Mr. McClendon asserts that the officers had insufficient reasonable suspicion to stop him because the stop was based upon unverified statements by an "unidentified witness." Mr. McClendon further alleges that they had insufficient probable cause to arrest and search him. For immunity purposes, the fundamental inquiry now turns upon whether Mr. McClendon's stop, arrest, and search were reasonable under the circumstances. Graham v. Connor, 490 U.S. 386 (1989). As discussed above, this is an objective inquiry, to be decided by the court as a matter of law. Doe v. Groody, 361 F.3d 232, 238 (3d Cir. 2004)(citing Bartholomew v. Pennsylvania, 221 F.3d at 428).

First, the investigatory stop was reasonable under the circumstances. A police officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable suspicion that criminal activity is afoot. Terry v. Ohio, 392 U.S. 1, 30 (1968). The police officer may also conduct a minimal search coincident with the stop sufficient to discover whether the person stopped is carrying a weapon. Id. at 29-30. Officers Enoch and

Lewis had sufficient reasonable suspicion to stop and frisk Mr. McClendon after receiving information from a police radio broadcast reporting the description of a “male waiving a gun.” Based on the information Officers Enoch and Lewis possessed prior to stopping Mr. McClendon, it was reasonable for them to conclude that they should stop Mr. McClendon, whom they believed fit the description of the individual described on the radio call. Officer Lewis then conducted a “pat down” of Mr. McClendon and felt an object which he believed to be a handgun. Based on the circumstances preceding the stop, it was reasonable for Officers Enoch and Lewis to believe that “crime was afoot,” which gave them the right to effectuate an investigatory stop of Mr. McClendon.

Second, Mr. McClendon’s arrest and subsequent search were also reasonable under the circumstances. The standard for determining the validity of an arrest is whether, at the moment the arrest was made, the officers had probable cause to make the arrest; whether at that moment the facts and circumstances within their knowledge were reasonably trustworthy and sufficient to warrant a prudent man to believe that the person arrested had committed a crime. Beck v. Ohio, 379 U.S. 89, 91 (1964); *see also* Michigan v. DeFillippo, 443 U.S. 31, 37 (1979). The validity of the arrest does not depend on whether the suspect actually committed a crime. Id. at 36.

Based on the information Officers Enoch and Lewis possessed after Mr. McClendon fled, i.e., that Mr. McClendon was armed, it was reasonable for them to conclude that they had probable cause to arrest him. Officer Lewis, in fact, effectuated the arrest and search of Mr. McClendon, which revealed, as suspected, a loaded handgun and a baggie filled with drugs. The facts of record in this case establish that the stop and subsequent arrest and search of Mr. McClendon satisfied the “reasonableness” requirement of the Fourth and Fourteenth

Amendments.

Because Mr. McClendon has failed to adequately plead a violation of the Fourth Amendment as that amendment has been incorporated into the Due Process Clause of the Fourteenth Amendment, Officer Enoch would still be entitled to qualified immunity.

In conclusion, Mr. McClendon filed his § 1983 claim long after the termination of the limitations period, and as such, his case is time-barred. He further failed to establish that Officer Enoch violated a clearly established right of Mr. McClendon while acting within the scope of her official duties as a law enforcement officer. Therefore, if the case were timely, Officer Enoch would be shielded from suit on the basis of qualified immunity. Finally, because Mr. McClendon failed to demonstrate a genuine issue of material fact for trial, Officer Enoch's motion for summary judgment is granted in its entirety. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TONY McCLENDON,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	NO. 02-CV-7433
	:	
TODD LEWIS, OFFICER, et al.,	:	
Defendants	:	

ORDER

STENGEL, J.

AND NOW, this 27th day of January, 2005, upon consideration of Defendant's motion for summary judgment (Document #28), and Plaintiff's response thereto (Document #30), it is hereby **ORDERED** that the motion is **GRANTED** in its entirety. The Clerk of Court shall close this case for all purposes.

BY THE COURT:

/s/ Lawrence F. Stengel _____
LAWRENCE F. STENGEL, J.